and it has been very generally held that an attempted change of beneficiary was effective when the insured had done "all that was required of him, or all possible for him to do" even though the company's action on his request took place after his death. *Mutual Life Co. v. Lowther* (1912) 22 Colo. App. 622, 126 Pac. 882; *Wandell v. Mystic Toilers* (1906) 130 Iowa, 639, 105 N. E. 448; *Grand Lodge v. McFadden* (1908) 213 Mo. 269, 111 S. W. 1172; *Luhrs v. Luhrs* (1890) 123 N. Y. 367, 25 N. E. 388. According to these cases the provision that the change is to "take effect only when endorsed on the policy by the company," or when some similar act is done, does not give the insurer the privilege of non-compliance with the insured's desire, but provides for a purely ministerial act, the performance of which could either be compelled by the new beneficiary or dispensed with altogether. There are some cases substantially in conflict with these, holding that where the insurer had not acted on the insured's request the change was not effective and could not be enforced. *Freund v. Freund* (1905) 218 Ill. 189, 75 N. E. 925; *O'Donnell v. Metropolitan L. Ins. Co.* (1915, Del.) 95 Atl. 289; *Sheppard v. Crowley* (1911) 61 Fla. 735, 55 So. 841. Even if an act of the insurer is one of the necessary operative acts to effect the change, and even if this act is discretionary with the insurer (i. e. he is privileged to do or not to do the act), there is no reason for requiring that act to be done prior to the death of the insured. The *power* in the insurer to effectuate the change comes from the original contract, to which the beneficiary's right is at all times subject, and the later action of the insured would seem to be merely a condition to the exercise of this power. Therefore the death of the insured after having fully performed the condition should not revoke the power of the insurer, even though the insured might possibly have revoked it by a voluntary act while living. *Luhrs v. Luhrs* (1890) 123 N. Y. 367, 25 N. E. 388 (*semble*). It necessarily follows, however, from the recognition of a discretionary power in the insurer, that there is no change of beneficiary if the company in its discretion refuses to do the necessary operative act, and this is true whether the insured is living or dead. *Freund v. Freund, supra.* And the contract may, of course, expressly confine the power of the insurer to acts performed prior to the death of insured. *Modern Woodmen v. Headle* (1914) 88 Vt. 37, 90 Atl. 893.

JUDGMENTS—EQUITABLE RELIEF—DEFENSE PREVENTED BY FAILURE TO RECEIVE SUMMONS.—A son forged his mother's signature to a note. In a suit upon the note summons was served at the mother's former residence (where she no longer resided) by delivery to the son, who concealed it from his mother. At the trial he appeared and testified to the genuineness of his mother's signature, and judgment was rendered against her. As the statutory period of 30 days for setting aside a judgment had expired, the trial court denied relief. The mother sued in equity for an injunction against enforcement of the judgment. *Held*, that proceedings on the judgment should be perpetually stayed unless the defendants should agree to a new trial. *Yung v. Roll Stickley & Sons* (1917, N. J. Eq.) 102 Atl. 698.

By rather labored reasoning the court construed this as a case of "accident," justifying equitable relief on that ground. No such straining of language would seem to be necessary. The objection to the validity of the judgment was the more fundamental one that the court had never acquired, by proper service, any jurisdiction over the judgment defendant. But though the judgment was void, there was no procedure at law to set it aside after the thirty days, and the aid of equity was therefore necessary to stop the machinery of enforcement. It is well settled that where, in an action depending on personal service to give jurisdiction, notice was not properly served upon the defendant, equity will enjoin enforcement of a judgment. *Jones v. Commercial Bank* (1840, Miss.)

5 How. 43 (defendant absent from residence); 2 Pomeroy, *Eq. Remedies,* sec. 663. This rule is of course subject to the usual qualification that equity will act only when common law procedure affords no adequate remedy. *Knight v. Creswell* (1907) 82 Ark. 330, 101 S. W. 754. Where the record at law is regular on its face, there is a conflict of authority as to whether a meritorious defense must be shown before an injunction will be granted. The majority rule seems to require such a showing. *Jeffery v. Fitch* (1879) 46 Conn. 601; *Bernhard v. Idaho Bk.* (1912) 21 Idaho 598, 123 Pac. 481; *contra, Cooley v. Barker* (1904) 122 Iowa 440, 98 N. W. 289. The persuasive argument of the minority is that the complainant is deprived of his property without due process of law, and on this ground an injunction should be granted independently of any other consideration. 2 Pomeroy, *Eq. Remedies,* sec. 667. But it would seem that the hearing before the court of equity would give him his day in court. In the principal case there was no difficulty on this point, as the facts alleged showed a complete defense to any liability on the note. Nor is it any bar to equitable relief in such cases that the plaintiff at law was innocent of any wrongdoing or unfairness. *Jeffery v. Fitch, supra;* 2 Pomeroy, *Eq. Remedies,* sec. 663.

JUDGMENTS — PERSONS CONCLUDED — RIGHTS OF ABSENTEE PRESUMED TO BE DEAD.—The defendant was the depositary of an employees' savings fund. The particular deposit in question was payable upon the death of the depositor to his sons or, if they were not living, to his legal representatives. His executrix demanded payment, the sons having been absent and unheard of for 18 years. From a judgment for the plaintiff the defendant appealed on the ground that such judgment would not protect it from having to pay again to the sons, should they subsequently appear. *Held,* that the judgment for the plaintiff was correct, with a *dictum* that payment thereunder would protect the defendant. *Maley v. Pennsylvania R. R. Co.* (1917, Pa.) 101 Atl. 911.

See COMMENTS, p. 943.

NEGLIGENCE—ACTING IN EMERGENCY.—The defendant company in constructing a dam pumped water into a chute whence it was discharged into the river causing a swift current. The deceased, an employee of the defendant and an expert swimmer, fell into the chute, was carried into the river and was drowned. In a suit for wrongfully causing his death, the negligence complained of was that a fellow employee attempted to give aid to the deceased instead of immediately stopping the pumps and thus abating the current. *Held,* that a verdict for the defendant was properly directed. *Kelch's Adm'r v. National Contract Co.* (1918, Ky.) 199 S. W. 796.

Negligence is a relative term dependent upon the circumstances under which one acts or fails to act. In an emergency, one who acts according to his best judgment, even though the event proves that he failed to choose the most judicious course, is not chargeable with negligence. Such act or omission may be called a mistake but not carelessness. *Brown v. French* (1883) 104 Pa. 604; *Floyd v. Philadelphia R. R. Co.* (1894) 162 Pa. 29, 29 Atl. 396. The question usually arises in cases where the defendant seeks to escape liability on the ground that the injured plaintiff was guilty of contributory negligence in choosing the wrong way to protect himself from the impending danger. See *Geary v. McCreary* (1912) 147 Ky. 254, 143 S. W. 1004. *Dicta* in certain Iowa cases seem to indicate a tendency to confine the emergency rule to such situations. See *Boice v. Des Moines City Ry. Co.* (1911) 153 Iowa 472, 477; 133 N. W. 657, 659. But other courts have applied the rule to defendants acting with mistaken judgment in an emergency which they have not caused. *Sekerak v. Jutte* (1893) 153 Pa. 117, 25 Atl. 994. It is submitted there is no sound basis for limiting the rule to the defence of contributory negligence. The effect of